

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 459 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

ALI MOHMED NASAR

Versus

STATE OF GUJARAT

Appearance:

MR AD SHAH for Petitioner

MR ND GOHIL, APP. for Respondent-State.

CORAM : MR.JUSTICE D.A.MEHTA

Date of decision: 09/03/2001

CAV JUDGEMENT

1. The appellant has been accused and convicted of offences punishable under sections 307, 324, 337 and 201 of the Indian Penal Code stated to have been committed on 8/10/1988 at around 10.30 a.m. at Bardhanchowk, Jamnagar. The judgment and order dated 31/7/1989 of learned Additional Sessions Judge, Jamnagar whereby the

appellant has been sentenced to undergo RI of five years for offence under section 307, RI of six months and fine of Rs.500/- and in failure one month's RI under section 324, sentence of two months R.I. under section 337 of IPC and sentence of R.I. of one year plus fine of Rs.500/-, or in the alternative, one month's R.I. for offence punishable under section 201 of the IPC is under challenge in this appeal.

2. The brief facts of the incident are that on 8/10/1988 at around 10.30 a.m. one Ansar Ahmed Abdul Satar was driving rickshaw No.GTT 1256 and one Aniruddh Pradyuman Bhatt was riding in the said rickshaw as he had hired the rickshaw. It is further found that Aniruddh Bhatt was carrying on business of publicity and advertisement and on the day of the incident he was travelling in the rickshaw for the publicity work of one Chintan Cutpiece Centre. It is further found that on the right hand side the rickshaw was displaying advertisement board and there was a mikeset (amplyfier set) placed in the rickshaw near feet of Aniruddh Bhatt who was advertising through mike for Chintan Cutpiece Centre. When the rickshaw reached Bardhanchowk one person suddenly came from behind the rickshaw stand on right hand side and inflicted stab wounds on both Aniruddh and Ansar Ahmed, the rickshaw driver. At this juncture the sequence in which the stab wounds were inflicted may not be narrated as there is a dispute about the same and the same shall be adverted to later. The rickshaw driver immediately left the ricksha and rushed to Darbargadh Police Chowki and from there after informing PSI Patel that one man had inflicted knife blows he was taken to Irvin Hospital by two police constables as directed by the PSI. Aniruddh Bhatt immediately went to Chintan Cutpiece Centre which was nearby and with the help of partner of the said Firm went in rickshaw to Irvin Hospital. Therefore, the fact that on 8.10.1988 at about 10.30 a.m. both Ansar Ahmed, rickshaw driver and Aniruddh Bhatt received stab wounds stands established and there is no dispute as regards the same. We may also state at this point that in so far as the nature of injuries is concerned the same stands established and is not disputed nor is the medical evidence disputed.

3. The case on behalf of the appellant as presented by Shri A.D.Shah is that Ansar Ahmed is the complainant and he has been declared hostile and thus the entire case of the prosecution remains unproved in as much as Aniruddh Bhatt has not been able to establish beyond reasonable doubt on behalf of the prosecution, as to identity of the assailant. It was further submitted that

the prosecution having failed to carry out the test identification parade and the identification having been made for the first time only in the Court the same could not be treated as sufficient corroboration which would point the finger towards the appellant as being the assailant. It is further submitted that all other witnesses examined on behalf of the prosecution have been declared as hostile witnesses; that in relation to the recovery of the weapon of offence, in absence of examination of the panch witness, such recovery does not stand proved and there is no statement from the accused appellant that the knife in question was concealed which would require any discovery or recovery as made out by the prosecution. Moreover, it was contended that there is serious dispute arising from the contradiction which appears in the statement of Aniruddh Bhatt as to whether Ansar Ahmed was attacked first and Aniruddh was injured when he tried to intervene or whether the attack was primarily on Aniruddh and Ansar Ahmed was hurt when he tried to intervene. It was further pointed out that not only this, but as to why and how the incident occurred also remains unproved in as much as the complainant and the main witness on behalf of the prosecution i.e. Ansar Ahmed has been declared hostile and his version at one stage is that rickshaw collided with a person on the road which resulted in quarrel, exchange of abuses and as a consequence the said person stabbed Ansar Ahmed first and Aniruddh was hurt while trying to intervene; other version is that the accused appellant, as alleged, appeared from behind the rickshaw stand all of a sudden and started stabbing Aniruddh who was in the passenger seat even while the rickshaw was moving and Ansar Ahmed was inflicted blows when he tried to intervene.

4. It was further pointed out on behalf of the appellant that identity of the assailant remains unproved. Elaborating on this, we were pointed out, by extensively referring to the deposition of Aniruddh to show that he was not aware as regards identity of the assailant; that while receiving primary treatment in the hospital he enquired of Ansar Ahmed as to who 'Aliya' was and that Ansar Ahmed informed him that he was son of Nasir Ghasletwala, that Aniruddh made this inquiry because, according to Aniruddh he had heard some rickshaw drivers shouting at the time of incident 'Aliya do not do it, stop it', and that is how he came to know that the name of the assailant was Aliya. However, on 8/10/1988 before Aniruddh was operated upon, the Executive Magistrate, Jamnagar, Rajnikant Jayshankar Purohit was summoned by the police to record dying declaration in view of the serious condition and at around 12.00 Noon

the dying declaration was recorded. The Executive Magistrate has been examined at Exh.67 on behalf of the defence to show that Aniruddh stated specifically 'I do not know Aliya' and further that 'while passing through bardhanchowk, a person named Aliya attacked rickshaw driver and as he tried to save himself I was attacked and inflicted blows in Stomach'. As against this it was pointed out that in cross-examination Aniruddh has specifically stated that he had never stated so before the Executive Magistrate. It was further pointed out that Aniruddh has stated that he might have seen Aliya as he might be driving rickshaw in the city but that he personally did not know him and he was not aware of his name, and only because at the time of incident some persons shouted 'Aliya' 'Aliya' he had given the name of the accused as 'Aliya'; that who shouted at the time of incident is not known to Aniruddh; that, Aniruddh further states that he had not given any description of Aliya to police; that Aniruddh had told the doctor that son of Nasirbhai Ghasletwala i.e. Aliya had stabbed him but Aniruddh had not informed the police that he had told the doctor accordingly. It is further pointed out from the deposition that Aniruddh does not know Nasirbhai Ghasletwala nor does he know where the accused resides and he does not know the reason as to why he was attacked. It is further pointed out that Aniruddh presumes that because he was holding Hindu Nationalistic view point or ideology he might have been attacked.

5. It was also pointed out that there is a contradiction between Aniruddh's deposition vis-a-vis that of Ansar Ahmed, wherein Aniruddh had stated that it is not correct that first of all rickshaw driver had been attacked and that thereafter he had been attacked; not only that, it is pointed out that in the cross-examination Aniruddh states that he had not permitted the Executive Magistrate to record that a person named Aliya had attacked rickshaw driver with knife and that as the driver tried to save himself the said person attacked Aniruddh who was sitting behind. Thus, it was emphasised that even Aniruddh is not sure as to who is the assailant and in what sequence the event took place; that this becomes important in absence of motive which the prosecution has not been able to show at all, and why one or the other was attacked having not been shown it cannot be stated beyond reasonable doubt that only the appellant was the assailant. It is further pointed out from the deposition of Aniruddh that he admits in no uncertain terms that he had no enmity with Aliya prior to this incident. Aniruddh has further stated in his deposition that it is not true that while

rickshaw was moving through bardhanchowk a pedestrain had been hit by rickshaw resulting in quarrel, exchanging of abuses and consequently attack on the rickshaw driver and Aniruddh being inflicted stab wounds for trying to intervene. To the contrary, it is stated that Aniruddh was attacked while he was sitting in rickshaw and that he was inflicted two blows while he was sitting inside.

6. In so far as identification of the accused assailant is concerned Aniruddh has admitted that no test identification parade was carried out and that he identified the accused in the Court for the first time and that he had seen the accused from time to time while remaining present in the Court during conduct of different chapter cases. Aniruddh further deposes that he had seen the assailant and because some person had shouted 'Aliya' Aliya' he had stated that the assailant was Aliya. As against this Ansar Ahmed has stated in his deposition in chief that he does not know the person who had inflicted the blows and he had seen him for the first time on the day and at the time of the incident, that he can identify the person if he sees him but the said person is not present in the Court room. Ansar Ahmed had further stated that he had not stated the name of the assailant in the complaint, that he does not know either Nasirbhai Ghasletwala or his son Ali Mohmad and that when the accused was pointed out to him in the Court room Ansar Ahmed had stated that he does not know him.

7. Over and above, on behalf of the appellant it was pointed out that the recovery of blood stained clothes from the house of the accused could not be relied upon as no evidence has been brought on record to show that these clothes belong to the accused appellant; that none of the witnesses have given description of the clothes that the accused was wearing at the time of the incident; that it is stated by the Investigating Officer that the mother of the accused had stated before him as recorded in the Panchnama that the clothes belonged to the accused; however, the mother of the accused has not been examined on this aspect of the matter and the panch witnesses have not supported the Panchnama drawn from the search of the house of the accused. Similarly, in relation to the alleged discovery of knife it was submitted that there is nothing on record to show that the accused had stated that weapon had been concealed by him and as a consequence thereof a search for the discovery had become necessary. That the panch witnesses have not been examined on this aspect of the matter and hence, discovery/recovery of the alleged weapon of offence remained unproved. It is further pointed out that as is

apparent from the record a knife with red colour scyth (cover) was stated to have been recovered and sent to the Forensic Science Laboratory while the knife which is stated to have been produced as muddamal in the Court is one without the skyth(cover) and hence, even this corroborative piece of evidence is not sufficient to connect the accused with crime, especially in absence of the identity of the assailant.

8. As against this, the learned APP in support of the order of conviction stated that as there was only one accused identification parade was not necessary and that both Ansar Ahmed and the accused Aliya are in the same business of driving rickshaw and were known to each other. It was further submitted that Aniruddh has specifically stated before the doctor that Aliya was assailant, that police constable Maganlal Sidibhai has also stated in his deposition (Exh.8) that Ansar Ahmad had come to Darbargadh Police Chowky and stated before PSI Patel that Aliya, son of Nasirbhai Ghasletwala had inflicted knife wounds in bardhanchowk; that police constable Ratubha Jethubha (Exh.47) has also corroborated that while he was on hospital duty he had recorded the details of the incident as told to him by the doctor and that the doctor had informed him that both Aniruddh and Ansar Ahmad had been stabbed by Aliya. Thereafter, we were pointed out from the deposition of the doctor concerned wherein it is stated that Ansar Ahmad had told the doctor that a person named Ali had stabbed him. It was therefore submitted that all other witnesses have corroborated that accused was the assailant and there being no dispute as to the day and the time and occurrence of the incident the accused appellant had rightly been convicted for the offence for which he was charged with.

9. Having gone through the evidence on record we find that the order of conviction cannot be sustained, the prosecution having failed to prove its case beyond reasonable doubt. It is apparent from the evidence on record that star witnesses of prosecution viz. Ansar Ahmed who is also the complainant has turned hostile and that in so far as identity of the assailant is concerned even Aniruddh who also can be treated as a prime witness has given conflicting version creating doubt as to identity of the person involved in commission of the offence.

10. In so far as the necessity of test identification parade is concerned we may usefully refer to two decisions of Apex Court. In the first decision reported

in 1999 SCC (Cri) 1452 (Rajesh Govind Jagesha V. State of Maharashtra), it has been laid down as under :

" xxx xxx xxx In cases where a person is alleged to have committed the offence and is not previously known to the witnesses, it is obligatory on the part of the investigating agency to hold identification parade for the purposes of enabling the witnesses to identify the person alleged to have committed the offence. The test identification is considered as a safe rule of prudence for corroboration. Though the holding of the identification proceedings may not be substantive evidence, yet such proceedings are used for corroboration purposes in order to believe or not the involvement of the person brought before the court for the commission of the crime. Hence, identification parade ought to be held strictly in accordance with the settled position of law and expeditiously . The delay, if any, has to be explained satisfactorily by the prosecution."

The second decision is AIR 1999 SC 3916 (State of Himachal Pradesh V. Lekh Raj) wherein at page 3918 it has been laid down as under :

" xxx xxx xxxx During the investigation of a crime the police agency is required to hold Identification Parade for the purposes of enabling the witness to identify the person alleged to have committed the offence particularly when such person was not previously known to the witness or the informant. The absence of Test Identification may not be fatal if the accused is known or sufficiently described in the complaint leaving no doubt in the mind of the Court regarding his involvement. Identification Parade may also not be necessary in a case where the accused persons are arrested at the spot. The evidence of Identifying the accused person at the trial for the first time is, from its very nature, inherently of a weak character. This Court in Budhsen v. State of U.P. (1970) 2 SCC 128 : (AIR 1970 SC 1321 : 1970 Cri LJ 1149) held that the evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances the complainant or the witness came to pick out the particular accused person and the details of the part which he allegedly played in the crime in

question with reasonable particularity. In such cases test identification is considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the Identity of the accused who are strangers to them. There may, however, be exceptions to this general rule, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely without such or other corroboration. Though the holding of identification proceedings are not substantive evidence, yet they are used for corroboration purposes for believing that the person brought before the Court was the real person involved in the commission of the crime. The identification parade even if held, cannot, in all cases, be considered as safe, sole and trustworthy evidence on which the conviction of the accused could be sustained. It is a rule of prudence which is required to be followed in cases where accused is not known to the witness or the complainant."

11. Applying the aforesaid tests to the facts of the case it is seen that the accused is not shown to be a person who was previously known to the witnesses or the complainant. In fact, there are lot of contradictions as to whether the accused was or was not known to the complainant and the witnesses. The accused was not arrested from the spot and in fact it is version of both complainant as well as witnesses that the assailant had run away. That the accused has been identified for the first time in the Court room by Aniruddh while the complainant has point blank refused to recognise the accused in the Court room. The object of holding test identification is to corroborate the substantive evidence, while in this case the substantive evidence itself is not forthcoming. That is to say, the involvement of the accused brought before the Court for the alleged commission of crime itself is in doubt and as such not holding of test identification parade in the instant case assumes significance and renders the case of the prosecution not only weak but becomes fatal to the case of the prosecution.

12. In so far as the corroboration by other witnesses viz. doctor, police constables etc., on which reliance was placed on behalf of the State, suffice it to state that when the complainant and the principal witnesses themselves are not sure of the identity of the assailant

corroboration which is merely a hearsay cannot carry the case of the prosecution any further.

13. As already referred to hereinbefore, Aniruddh's deposition itself shows that he does not know the assailant personally, he does not know the father of the assailant, he does not know where the assailant resides, and that whatever he had stated regarding assailant was on the basis of what Ansar Ahmed informed him at the time of receiving primary treatment in the hospital and on the basis of shouts of some persons (who remain unidentified) at the time of the incident. On the other hand, Ansar Ahmed has specifically deposed that he does not know the assailant nor has he identified him in the Court room. The identification of the accused by Aniruddh comes for the first time before the Court and that too after a period of almost more than nine months. Therefore, taking into consideration that Ansar Ahmed has been declared hostile and there are inherent contradictions in the deposition of Aniruddh firstly, vis-a-vis his own statement before the Executive Magistrate, secondly, vis-a-vis the statement in the complaint, and thirdly, vis-a-vis the statement of Ansar Ahmed, we cannot say that the prosecution has established the charges against the accused by cogent and reliable evidence beyond reasonable doubt.

14. The other factors which weaken the case of the prosecution further are : (a) absence of any motive for the accused to assault Ansar Ahmed and Aniruddh, who themselves say that they do not know the accused assailant prior to the incident, (b) the reason as to why and how the incident occurred is also not forthcoming in as much as there is contradiction between the statement of Ansar Ahmed and Aniruddh as well as in their own deposition at two different points of time; (c) the recovery of blood stained clothes from the house of the accused remains unproved; (d) same is the position vis-a-vis the recovery of the knife; and further (e) whether it is the same knife which is produced as muddamal before the Court.

15. Therefore, on overall view we find that the Trial Court has erred in drawing inference from the facts found to link the accused appellant with the incident and convict him on the basis of evidence which is available on record, the prosecution having failed to prove its case beyond reasonable doubt. We, therefore, allow this appeal and set aside the judgment and order of conviction dated 31/7/1989, acquit the appellant of charges framed against him under sections 307, 324, 337 and 201 of the

Indian Penal Code. Records and Proceedings be returned.

Sd/-

(D.A.Mehta, J)

m.m.bhatt